

Michael L. Crowley (117008)
Andre L. Verdun (265436)
CROWLEY LAW GROUP
401 West "A" Street, Ste. 925
San Diego, CA 92101
Tel. (619) 238-5700
Fax. (866) 786-6993
MLCrowley@CrowleyLawGroup.com
AndreVerdun@CrowleyLawGroup.com

Attorney for Plaintiffs
Terry Polk and Timothy Wagoner

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TERRY POLK, and TIMOTHY WAGONER.

Plaintiffs,

vs.

LEGAL RECOVERY LAW OFFICES, PALISADES COLLECTION, and MARK WAI SHI

Defendants

Case No.: 12-CV-0641-W-MDD

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSES

Dated: April 1, 2013

Time: N/A

Dept.:3C

Judge: Hon. Thomas J. Whelan

**NO ORAL ARGUMENT
PURSUANT TO LOCAL RULE**

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I. INTRODUCTION

In responding to Plaintiffs' Complaint, Defendants' LEGAL RECOVERY LAW OFFICES (LRLO) and PALISADES COLLECTION (PALISADES) (jointly "Defendants"), filed Answers to the Complaint (Docket # 16, 17) (hereinafter "Answer"), containing various "Affirmative Defenses" identified as paragraphs 70-89 in each Answer. While defendants LRLO and PALISADES filed separate Answers, they are identical in all respects concerning the Affirmative Defenses, to the point where some of the Affirmative Defenses in PALISADES' answer, PALISADES refers to itself as LRLO.

Pursuant to Fed. R. Civ. P. 12(f), Plaintiff moves to strike the First through Twentieth Affirmative defenses from Defendants' Amended Answer (Docket #16 and 17) on the grounds that, Defendants have attempted to allege defenses which are not actually defenses, Defendants have raised immaterial defenses, and that the defenses are not pled with sufficient particularity to provide Plaintiff with "fair" notice. Moreover, the pleadings fail to raise the alleged defenses beyond the speculative level.

II. POINTS AND AUTHORITIES

A. The Holdings of *Twombly* and *Iqbal* Apply to Affirmative Defenses

After the Supreme Court altered the landscape for 12(b)(6) requirements in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and *Ashcroft v. Iqbal*, ____ U.S. ____;

1 129 S. Ct. 1937; 173 L. Ed. 2d 868 (2009) the majority of courts to address
 2 the issue have concluded that the heightened pleading standards for claims
 3 for relief crafted in *Twombly* and *Iqbal* apply just as strictly to affirmative
 4 defenses. See, *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 650 (D.
 5 Kan. 2009) (collecting district-court cases from the Second, Fifth, Sixth,
 6 Seventh, Ninth, and Eleventh Circuits reaching this conclusion).
 7

8 To survive a Rule 12(f) motion then, an affirmative defense cannot
 9 simply be conclusory and devoid of facts; rather, it must set forth a factual
 10 basis, and cannot merely suggest that the defense may possibly bear upon
 11 the case. *Id.*; see also, *Tracy v. NVR, Inc.*, 2009 U.S. Dist. LEXIS 90778
 12 (W.D.N.Y. Sept. 30, 2009) (“Indeed, the *Twombly* plausibility standard
 13 applies with equal force to a motion to strike an affirmative defense under
 14 Rule 12(f).”). Here, all of Defendants’ affirmative defenses fall well below
 15 this bar.

16 While a minority of cases have concluded that *Twombly* and *Iqbal* do
 17 not apply to affirmative defenses, the *Hayne* court succinctly addresses this
 18 point in adopting the prevailing view:

19
 20 It makes no sense to find that a heightened
 21 pleading standard applies to claims but not to
 22 affirmative defenses. In both instances, the purpose
 23 of pleading requirements is to provide enough
 24 notice to the opposing party that indeed there is
 25 some plausible, factual basis for the assertion and
 26 not simply a suggestion of possibility that it may
 27 apply to the case. Moreover, FED. R. CIV. P. 8 is
 28 consistent in at least inferring that the pleading
 requirements for affirmative defenses are
 essentially the same as for claims for relief. . . .
 Applying the standard for heightened pleading to
 affirmative defenses serves a valid purpose in
 requiring at least some valid factual basis for
 pleading an affirmative defense and not adding it to
 the case simply upon some conjecture that it may
 somehow apply. *Hayne v. Green Ford Sales, Inc.*,
 263 F.R.D. at 650.

In this post-*Iqbal* world, the days of defendants simply trotting out the same affirmative defenses, case after case without any factual support whatsoever, appear to be over.

B. The Policies of Twombly, Iqbal and Rule 12 Support the Plaintiff

As one court has aptly stated, “[a]pplying the standard for heightened pleading to affirmative defenses serves a valid purpose in requiring at least some valid factual basis for pleading an affirmative defense and not adding it to the case simply upon some conjecture that it may somehow apply.” *Id.*

While Rule 12(f) motions may sometimes be disfavored as dilatory, they are appropriately granted where a party asserts “a defense that might confuse the issues in the case and would not, under the facts alleged, constitute a valid defense.” *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001) (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1380, 665 (2d ed. 1990)). Matters are appropriately stricken if they are “not properly supported by the facts alleged in the pleading.” *Microsoft Corp. v. Computer Support Servs. of Carolina, Inc.*, 123 F. Supp. 2d 945, 950 (W.D.N.C. 2000); *Schecter v. Comptroller of City of N.Y.*, 79 F.3d 265, 270 (2d Cir. 1996) (striking affirmative defense and noting that “defenses which amount to nothing more than mere conclusions of law and are not warranted by any asserted facts have no efficacy”). Similarly, the Court should strike a defense “that is clearly insufficient as a matter of law.” *Hanzlik v. Birach*, 2009 U.S. Dist. LEXIS 63091 (E.D. Va. July 14, 2009), citing *Microsoft Corp. v. Computer Support Servs. of Carolina, Inc.*, 123 F. Supp. 2d 945, 949 (W.D.N.C. 2000); *Home Mgmt. Solutions, Inc. v. Prescient, Inc.*, 2007 U.S. Dist. LEXIS 61608 (S.D. Fla. Aug. 21, 2007);

1 *Kaiser Aluminum & Chemical Sales, Inc. v. Avon-dale Shipyards, Inc.*, 677
 2 F.2d 1045, 1057 (5th Cir. 1982).

3 “Affirmative defenses plead matters extraneous to the plaintiff's *prima*
 5 *facie* case, which deny plaintiff's right to recover, even if the allegations of
 6 the complaint are true.” *Federal Deposit Ins. Corp. v. Main Hurdman*, 655
 7 F. Supp. 259, 262 (E.D. Cal. 1987), citing *Gomez v. Toledo*, 446 U.S. 635,
 8 640-641 (1980). In contrast, denials of the allegations in the Complaint or
 9 allegations that the Plaintiff cannot prove the elements of his claims are not
 10 affirmative defenses. *Solis v. Couturier*, 2009 U.S. Dist. LEXIS 63271 (E.D.
 11 Cal. July 7, 2009).

12 Since Federal Rule of Civil Procedure 8(c) governs the pleading of
 13 affirmative defenses, plaintiffs are entitled to fair notice of each defense
 14 and the grounds supporting it. *Grunley Walsh U.S., LLC v. Raap*, 2009 U.S.
 15 Dist. LEXIS 38609 (E.D. Va. May 6, 2009), citing 5 CHARLES ALAN
 16 WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND
 17 PROCEDURE § 1274 (3d ed. 2004). With that requirement in mind, courts
 18 evaluate a Rule 12(f) motion to strike against the same standard as a Rule
 19 12(b)(6) motion to dismiss. *Solvent Chem. Co. ICC Indus., Inc. v. E.I.*
 20 *Dupont De Nemours & Co.*, 242 F. Supp. 2d 196, 212 (W.D.N.Y. 2002)
 21 (“The standard for striking an affirmative defense is the mirror image of the
 22 standard for considering whether to dismiss for failure to state a claim.”).

23 **C. The FDCPA Allows Only Those Defenses Set Forth in Statute**

24 In this case, some of the defenses raised relate to the claims under
 25 the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. Since this
 26 is a federal statutory cause of action, the defenses are limited to those set
 27 out in the statute itself. *Howlett v. Rose*, 496 U.S. 356, 375 (1990) (“The
 28 elements of, and the defenses to, a federal cause of action are defined by

federal law."); see also *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 232 (4th Cir. 2007) ("To insist that some unarticulated, common law immunity survived the creation of the FDCPA would be to fail to give effect to the scope of the immunity articulated in the text"). Moreover, the FDCPA is a strict liability statute. *Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1175 (9th Cir. 2006); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2nd Cir. 1996).

An affirmative defense is the "defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true." *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003). In an FDCPA case, there are only two defenses under § 1692k(c)-(e):

- statute of limitations, and
- bona fide error.

The Court may strike from defendant's answer "any insufficient defense," Fed. R. Civ. P. 12(f), so as to streamline the ultimate resolution of the case and avoid the waste of time and money involve in litigating spurious issues, by eliminating those issues early on. *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1442 (W.D. Mich. 1989).

1. Defendants Have Not Stated a Bona Fide Error Defense

Defendants' twelfth and thirteenth affirmative defenses in Defendants' Answer to Plaintiff's Complaint offers the following affirmative defense: The alleged violations and/or causes of action asserted by the plaintiff were or are the result of a bona fide error; and, The alleged violations and/or causes of action asserted by the plaintiff were or are the result of a bona fide mistake.

1 Defendants merely asserts that it is entitled to this defense. Failure to
 2 provide a “factual basis” in support of an affirmative defense is justification
 3 for striking subject affirmative defense.

5 If the *bona fide error* defense is to have any meaning in the context of
 6 a strict liability statute, then a showing of “procedures reasonably adapted
 7 to avoid any such error” must require more than a mere conclusory
 8 assertion to that effect. The procedures themselves must be explained,
 9 along with the manner in which they were adapted to avoid the error. Only
 10 then is the mistake entitled to be treated as one made in good faith.

11 The defense should be stricken because it does not contain a short
 12 and plain statement of any facts supporting the defense, as required by
 13 Fed. R. Civ. P. Rule 8. Even before Iqbal, this result was reached in
 14 FDCPA cases.

15 Because the defense at issue deals with an alleged “mistake” -- a
 16 “*bona fide error*” in the statutory parlance -- Defendant is obligated to
 17 comply with both Fed. R. Civ. P. 8 and 9(b). The standard under Rule 9(b)
 18 requires parties to state the circumstances of a mistake with “particularity.”
 19 *Konewko v. Dickler, Kahn, Sloikowski & Zavell, Ltd.*, 2008 U.S. Dist. LEXIS
 20 40685 (N.D. Ill. May 14, 2008); see also, *Bradshaw v. Hilco Receivables,*
 21 LLC, 2010 U.S. Dist. LEXIS 75553 (D. Md. July 27, 2010) (striking *bona*
 22 *fide* error defense that was not plead with particularity as required by Fed.
 23 R. Civ. P. 9(b)).

24 Affirmative “defenses which amount to nothing more than mere
 25 conclusions of law and are not warranted by any asserted facts have no
 26 efficacy.” *National Acceptance Co. of Am. v. Regal Prods., Inc.*, 155 F.R.D.
 27 631, 634 (E.D. Wis. 1994).

1 The conclusory assertion of *bona fide* error, devoid of any facts, does
 2 not comply with the particularity requirement of Fed. R. Civ. P. 9(b), which
 3 mandates that “In all averments of . . . mistake, the circumstances
 4 constituting . . . mistake shall be stated with particularity.” DEFENDANTS
 5 has not described how any mistake (error) occurred. The Rule requires
 6 particularity, not bald conclusory assertions. “Particularity” as used in Rule
 7 9(b) means “the who, what, when, where, and how of the mistake: the first
 8 paragraph of any newspaper story.” *GE Capital Corp. v. Lease Resolution*
 9 *Corp.*, 128 F.3d 1074, 1078 (7th Cir. 1997); *Konewko vs. Dickler, Kahn,*
 10 *Sloikowski & Zavell, Ltd.*, 2008 U.S. Dist LEXIS 40685 (N.D. Ill. May 4,
 11 2008) (bona fide error defense stricken for lack of particularity).

12 Pursuant to Iqbal, “[a] pleading that offers ‘labels and conclusions’ or
 13 ‘a formulaic recitation of the elements of a cause of action will not do.’ ” 129
 14 S. Ct. 1937, 1949. “Nor does a [pleading] suffice if it tenders ‘naked
 15 assertion[s]’ devoid of ‘further factual enhancement.’ ” *Id.*

16 **2. DEFENDANTS Has Not Stated a Statute of Limitations Defense**

17 In the second affirmative defense its Answer, DEFENDANTS puts
 18 forth the following affirmative defense that the complaint was brought
 19 beyond the expiration of the statute of limitations. DEFENDANTS' statute of
 20 limitations defense is insufficient as a matter of law for failure to plead
 21 responsive facts. The statute of limitations for violations of the federal Fair
 22 Debt Collection Practices Act (15 U.S.C. § 1692k(d)) and the California
 23 Rosenthal Fair Debt Collection Practices Act (Cal. Civil Code § 1788.30(f))
 24 is one year. The statute of limitations is tolled until the Plaintiff discovered
 25 the FDCPA violation. *Mangum v. Action Collection Service, Inc.*, 575 F. 3d
 26 935. Less than one year elapsed between the violations allegedly
 27 committed and the commencement of this action. Any conduct beyond the
 28

1 one year was outside the knowledge of the Plaintiffs until within one year of
2 this suit being filed. Indeed, Defendants brought a motion to dismiss and
3 never alleged a statute of limitations issue. Therefore, Defendants cannot
5 prevail on a statute of limitations defense.

6 / / /

7 / / /

8 **D. Defenses to be Stricken Because They are Not Actually Defenses**

9 The following “Affirmative Defenses” raised in Defendants First
10 Amended Answer should be stricken because they are not actually
11 defenses.

12 **1. First Affirmative Defense:** Defendant alleges that the Complaint, and
13 each claim or cause of action contained therein, fails to state facts sufficient
14 to constitute a claim or cause of action. “Failure to state a claim is not a
15 proper affirmative defense but, rather, asserts a defect in [Plaintiff's] prima
16 facie case.” *Barnes v. AT&T Pension Benefit Plan - Nonbargained*
17 Program, 2010 U.S. Dist. LEXIS 62515 at 18 (N.D. Cal. June 22, 2010)
18 (Patel, J.).

19 Failure to state a claim is a defect in the plaintiff's claim; it is not an
20 additional set of facts that bars recovery notwithstanding the plaintiff's valid
21 prima facie case. Therefore, it is not properly asserted as an affirmative
22 defense. *Boldstar Tech., LLC v. Home Depot, Inc.*, 517 F. Supp. 2d 1283,
23 1291 (S.D. Fla. 2007).

24 Because “failure to state a claim under Rule 12(b)(6) is more properly
25 brought as a motion and not an affirmative defense” it should be stricken
26 from DEFENDANTS' Answers. *Barnes v. AT&T Pension Benefit Plan -*
27 *Nonbargained Program*, 2010 U.S. Dist. LEXIS 62515 at 18 (N.D. Cal.
28 June 22, 2010) (Patel, J.).

1 **2. Third Affirmative Defense:** Defendants allege “[t]hat all of Defendant
 2 [LRLO and PALISADES’s] actions were taken in good faith and with due
 3 care, and Defendant did not directly engage in the alleged act, acts or
 5 omission(s) constituting the alleged violations or causes of action asserted
 6 by plaintiff.

7 DEFENDANTS offers the Court and the Plaintiff no factual basis
 8 whatsoever for its moving target affirmative defenses of “good faith” and
 9 “due care.” As such DEFENDANTS is not entitled to the defense as a
 10 matter of law pursuant to *Iqbal* and *Twombly*.

11 Plaintiff is entirely unable to prepare a response to such a vague
 12 affirmative defense. It should be stricken. Moreover the FDCPA is a strict
 13 liability statute. *Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162,
 14 1175 (9th Cir. 2006) so “due care” and “good faith” aren’t valid defenses.

15 **3. Fourth Affirmative Defense:** Defendants allege “they did not engage in
 16 any conduct that was intentional, knowing, willfull [sic], reckless, malicious,
 17 wanton or outrageous and Defendants acted in good faith at all times.”

18 Plaintiff is entirely unable to prepare a response to such a vague affirmative
 19 defense. It should be stricken. Moreover the FDCPA is a strict liability
 20 statute. *Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1175
 21 (9th Cir. 2006) so “due care” and “good faith” aren’t valid defenses.

22 **4. Fifth Affirmative Defense:** Defendants allege “Plaintiff’s claims are
 23 barred by the doctrine of estoppel.” Not only does Defendant not put forth
 24 facts to support this claim in their Answer, Your Honor already denied a
 25 motion to dismiss on the basis of Estoppel. ORDER Denying Defendants'
 26 Motion to Dismiss for Lack of Jurisdiction (ECF 15).

27 **5. Sixth Affirmative Defense:** Defendant alleges laches. Again, no facts
 28 are provided to support this defense; moreover, the status of limitations for

1 the federal Fair Debt Collection Practices Act (15 U.S.C. § 1692k(d)) and
2 the California Rosenthal Fair Debt Collection Practices Act (Cal. Civil Code
3 § 1788.30(f)) is one year. Laches is not provided by the statute.

5 **6. Seventh Affirmative Defense:** Defendants allege “Plaintiff’s
6 claims are barred by the doctrine of waiver”. Without facts, this defense is
7 unintelligible. Plaintiff is entirely unable to prepare a response to such a
8 vague affirmative defense. It should be stricken. Also, waiver is not a
9 defense provided by the statute.

10 **7. Eighth Affirmative Defense:** Defendants allege “Plaintiff’s claims are
11 barred by the doctrine of res judicata.” Not only does Defendant not put
12 forth facts to support this claim in their Answer, Your Honor already denied
13 a motion to dismiss on the basis of res judicata. ORDER Denying
14 Defendants’ Motion to Dismiss for Lack of Jurisdiction (ECF 15).

15 **8. Ninth Affirmative Defense:** Defendants allege “Plaintiff’s claims are
16 barred by the doctrine of collateral estoppel.” Not only does Defendant not
17 put forth facts to support this claim in their Answer, Your Honor already
18 denied a motion to dismiss on the basis of Collateral Estoppel. ORDER
19 Denying Defendants’ Motion to Dismiss for Lack of Jurisdiction (ECF 15).

20 **9. Tenth Affirmative Defense:** Defendants allege “Plaintiff failed to
21 mitigate his damages, if any were suffered.” Without facts, this defense is
22 unintelligible. Plaintiff is entirely unable to prepare a response to such a
23 vague affirmative defense. It should be stricken.

24 **10 .ELEVENTH AFFIRMATIVE DEFENSE:** Defendants allege “Plaintiff’s
25 damages, if any, were caused by the actions or inactions of others whom
26 these answering Defendant had no control”. Without facts, this defense is
27 unintelligible. Plaintiff is entirely unable to prepare a response to such a
28 vague affirmative defense. It should be stricken.

1 **11. FOURTEENTH AFFIRMATIVE DEFENSE:** Defendants allege
2 “Plaintiff’s claims are diminished by the doctrine of contributory
3 negligence”. Without facts, this defense is unintelligible. Plaintiff is entirely
4 unable to prepare a response to such a vague affirmative defense. It
5 should be stricken.

6 **12. FIFTEENTH AFFIRMATIVE DEFENSE:** Defendants allege “The
7 alleged violations and/or causes of action asserted are protected speech
8 under the first amendment and protected under the litigation privilege
9 including but not limited to California Civil Code §47”. Without facts, this
10 defense is unintelligible. Plaintiff is entirely unable to prepare a response to
11 such a vague affirmative defense. It should be stricken. Moreover, federal
12 law such as the FDCPA is exempted from state litigation privilege. Sayyed
13 v. Wolpff & Abramson, 485 F.3d 226, 229 (4th Cir. 2007) [federal FDCPA
14 and federal statutes]; see also Heintz v. Jenkins, 514 U.S. 291, 292-294
15 (1995) [attorneys liable under FDCPA even when engaging in litigation
16 activities]; *Komarova v. National Credit Acceptance, Inc.* 175 Cal. App. 4th
17 324 (2009) [California/Rosenthal FDCPA].

18 **13. SIXTEENTH AFFIRMATIVE DEFENSE:** Defendants allege “that if
19 Plaintiff was damaged in any sum or sums as alleged, which Defendant
20 denies, then Plaintiff’s damages are limited by 15 U.S.C. §§1692k(a)(1),
21 1692k(a)(2)(A), 1692k(a)(3) and 1692k(b)(1)”. This is not a defense.

22 **14. SEVENTEENTH AFFIRMATIVE DEFENSE:** Defendants allege “that
23 Defendant acted lawfully and within their legal rights, with a good faith
24 belief in the exercise of their rights and in furtherance of a legitimate
25 business purpose and such actions were justified and reasonable under the
26 circumstances based on the information available. Without facts, this
27
28

1 defense is unintelligible. Plaintiff is entirely unable to prepare a response to
2 such a vague affirmative defense. It should be stricken.

3 **15. EIGHTEENTH AFFIRMATIVE DEFENSE:** Defendants allege “that if
5 any false representations occurred, which is denied, that any false
6 representations were non-material and not actionable under the FDCPA”.
7 Without facts, this defense is unintelligible. Plaintiff is entirely unable to
8 prepare a response to such a vague affirmative defense. It should be
9 stricken.

10 **16. NINETEENTH AFFIRMATIVE DEFENSE:** Defendants allege “this
11 lawsuit was brought in bad faith and is completely without merit”. Without
12 facts, this defense is unintelligible. Plaintiff is entirely unable to prepare a
13 response to such a vague affirmative defense. It should be stricken.

14 **17. TWENTIETH AFFIRMATIVE DEFENSE:** Defendants “reserves the
15 right to add additional affirmative defenses as may be discovered through
16 future discovery. This is not a defense.

17 **III. CONCLUSION**

18 For the foregoing reasons, Plaintiff requests that the Court strike ¶¶ 70-
19 89 from Defendant LRLO’s Answer (Doc. 16) and Defendant PALISADES’
20 Answer (Doc. 17) and.

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22 Dated this: **February 19, 2013**

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CROWLEY LAW GROUP
Andre L. Verdun
Attorney for the Plaintiff

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

TERRY POLK, and TIMOTHY WAGONER,

Case No.: 12-CV-0641-W-MDD

CERTIFICATE OF SERVICE

Plaintiffs,

vs.

LEGAL RECOVERY LAW OFFICES, PALISADES COLLECTION, and MARK WALSH,

Defendants.

IT IS HEREBY CERTIFIED THAT: I, Andre L. Verdun, am a citizen of the United States and am at least eighteen years of age. My business address is 401 West "A" Street, Suite 925, San Diego, CA 92101. I am not a party to the above-entitled action. I have caused service of the following document(s): **NOTICE OF MOTION TO STRIKE AFFIRMATIVE DEFENSES AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSES** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

David Andrew Cotter d.cotter1@cox.net

Andre L. Verdun andreverdun@crowleylawgroup.com

Andrew Paul Rundquist arundquist@lrlo.com

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

NONE

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 19, 2013.


Andre L. Verdun